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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE CARLOS DELRIO and ALBERTO BARBA, Defendants and Appellants.	G038771 (Super. Ct. No. 05WF1694) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant Jose Carlos Delrio.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant Alberto Barba.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Sharon L. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellants Jose Carlos Delrio and Alberto Barba of attempted murder, discharging a firearm in a school zone and street terrorism. It also found various gang and firearm enhancement allegations to be true. On appeal, appellants allege evidentiary error, instructional error, prosecutorial misconduct and insufficiency of the evidence. We reject their arguments and affirm the judgment.

FACTS

In 2005, appellants belonged to the 18th Street gang, which was engaged in an ongoing rivalry with the Anaheim Boys from the Hood (BFTH). There had been multiple shootings and fights between the two gangs, and one day in the spring of 2005 they clashed outside a convenience store. During that incident, Delrio fought with BFTH member Francisco Hernandez.

A few months later, on June 15, Hernandez was waiting at a bus stop when appellants pulled up behind him in a gray Mustang convertible. Delrio stepped out of the passenger seat and asked Hernandez where he was from, i.e., what gang he was in. When Hernandez replied BFTH, Delrio said "fuck The Boys" and "fuck your neighborhood." He then pulled out a gun, aimed it toward Hernandez and fired the weapon. Hernandez's first reaction was to duck to the ground. Then he got up, ran across the street and took refuge in a school. As he was getting away, he noticed Delrio fumbling with the gun, as if he were trying to fire it again. However, he only got off the one shot. The bullet struck a school window that was in line with Hernandez's path of escape, about 12 feet above the ground.

At the time of the shooting, an undercover police officer just happened to be in the area. He immediately pursued appellants' vehicle as it left the scene, and following a short high-speed chase, appellants crashed and were taken into custody. Although their gun was never found, a particle of gunshot residue was recovered from Delrio's right hand, and another particle was recovered from Barba's left hand. Inside

their car, police found two compact discs with gang writing on them. They also found various gang-related items in Delrio's home.

Gang expert Peter Vi testified Delrio was a full-fledged member of 18th Street, and Barba was an "active associate" of that gang. He also opined appellants carried out the shooting to benefit the gang. In forming his opinion that Barba was a member of 18th Street, Vi relied on three primary factors: 1) Barba was a good friend of Delrio; 2) he accompanied Delrio during the shooting and drove the getaway car; and 3) a few weeks before the shooting, 18th Street and BFTH had an altercation in a park during which two people were seen in a gray Mustang convertible.

Speaking of gangs in general, Vi testified gang members usually know when another member of their gang has a gun. He said this information is important because when gang members get in a dangerous situation, they need to know who they can look to for protection. The gunman will be expected to keep an eye out for unarmed members of his gang, and the unarmed members will be expected to act as backup for the gunman.

Gang investigator Jonathan Wainwright also testified about the subculture of gangs. He said gang members usually do not bring outsiders along when they commit a crime. So, if a person accompanies a gang member during a crime, it is an indication that person is also a gang member. Wainwright said the nature of the crime and the circumstances surrounding it are also important in determining whether a person involved in a crime is a gang member.

The defense theory was that appellants were merely at the school to pick up a friend and were not looking for trouble. According to Delrio's testimony, he and Barba were unfamiliar with the area, so they stopped and asked Hernandez for directions. Then things got ugly. Hernandez called Delrio a "wetback," and Delrio got out of the car to fight. Hernandez then stepped back and made a move toward his waistband. Thinking he was going for a gun, Delrio pulled out his gun and fired a shot toward him. That

caused his gun to break apart, so he got back in the car and drove away with Barba. Delrio testified he aimed high and did not intend to hit Hernandez. But upon arrest, after initially denying he fired the gun at all, he admitted he fired the shot toward Hernandez.

The jury found Delrio guilty of attempted premeditated murder, discharging a firearm in a school zone and street terrorism. It also found he committed the attempted murder for the benefit of a criminal street gang and he personally used and discharged a firearm. The verdict against Barba was the same, except the jury convicted him of attempted murder without premeditation and found he was vicariously armed during the crimes. The court sentenced Barba, the deuteragonist, to 25 years in prison, and Delrio to life without the possibility of parole, plus 20 years.

On appeal, appellants raise a multitude of claims, some of which are interrelated. We will address Barba's claims first.

I

The prosecution posited Barba was guilty of attempted murder under two distinct theories of aiding and abetting liability: 1) He directly assisted Delrio in committing that offense; and 2) he helped Delrio commit the lesser crime of disturbing the peace, and attempted murder was a natural and probable consequence of that crime, as committed. Under both of these theories, the prosecution was required to prove Delrio intended to kill Hernandez. Barba argues there is insufficient evidence Delrio harbored such intent, but we disagree.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) A reversal "is unwarranted

unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Relying on the fact Delrio shot at Hernandez only once, and the shot went over his head, Barba contends the evidence reasonably suggests Delrio's intent was to warn or scare Hernandez, rather than kill him. However, while Delrio fired only once, Hernandez saw him fumbling with the gun after the shot, as if he were trying to fire again. And although the shot went about six feet over Hernandez's head, Delrio admitted to the police he fired the gun toward Hernandez, and the evidence showed the bullet landed in Hernandez's path of escape. This suggests Delrio was trying to hit Hernandez, but simply missed his mark.

Poor marksmanship does not negate the intent to kill if the circumstances surrounding the shooting evidence such intent. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945.) Indeed, the act of firing a gun toward a person at close range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill." (*Id.* at p. 945.) And that's precisely what Delrio did in this case. He also had a strong motive to kill Hernandez. Not only were they rival gang members who had clashed in the past, but Delrio cursed Hernandez's gang just before he shot at him. He clearly harbored an animus toward Hernandez and was poised for violence. Based on all the evidence presented, a reasonable trier of fact could find that Delrio's intent in shooting toward Hernandez was to kill him.

II

Barba also contends there is insufficient evidence he knew Delrio had a gun, a critical factual component of the prosecution's theory he directly aided and abetted Delrio during the shooting. In attempting to prove this fact, the prosecution relied on Detective Vi's testimony gang members generally know when another member of their gang has a gun, especially when they are committing a crime together. Barba contends this testimony was insufficient to prove he knew Delrio had a gun because it constituted

improper opinion testimony,[1] and there was no credible evidence he was a member of Delrio's gang. Both contentions are inaccurate.

"The use of expert testimony in the area of gang sociology and psychology is well established. [Citations.]" (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370-1371.) Although a gang expert may not render an opinion as to what the defendant knew or was thinking on a particular occasion (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1999 [expert improperly allowed to offer his opinion about minor's *specific intent* at time of offense]; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658-659 [holding inadmissible expert's opinion that defendant *specifically knew* other members of his gang were armed at time of shooting]), he may testify about the customary habits and general expectations of gang members when they are confronted with a specific situation. (*People v. Ward* (2005) 36 Cal.4th 186, 209-210; *People v. Killebrew*, *supra*, 103 Cal.App.4th at p. 658.)

In this case, the prosecutor asked Vi, "Based on your training and experience in the gang subculture, do gang members generally know when other gang members or associates with them have a gun?" Vi answered yes, and in overruling defense counsel's objection to the question, the court explained why the question was proper: "She's (the prosecutor's) not asking [Vi] in your opinion would Barba know that Delrio had a gun. [¶] In *Killebrew*, that's what happened. The officer took the stand, he goes, in my opinion, defendant X, Y, and Z would know the other guy had a gun. [He was] specifically talking about the subjective intent of the other defendants. [¶] [Here, however, the] question hasn't even touched upon the two defendants. It's just generic gang topic."

The court's analysis was correct. Because Vi was not asked to give his opinion as to what appellants were thinking or knew at the time of the shooting, his

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1 This argument is set forth in section IV of Barba's brief.

testimony about the general gun handling practices of gangs was permissible. (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1371 [gang expert's testimony properly "focused on what gangs and gang members typically expect and not on (the defendant's) subjective expectation in this instance"].)

Vi also explained *why* gang members generally make it a habit to know when other members of their gang are armed. He said it is simply a matter of self-protection: if a gang member gets caught in a perilous situation, he needs to know who he can to look to for help. Again, this testimony was geared toward what "the typical gang member" would think and expect. At no time did Vi offer his opinion as to what Barba thought or expected, and at no time did he say whether he believed Barba knew Delrio was armed. Therefore, his testimony was proper.

Still, the testimony was only relevant to the extent the People were able to establish Barba was a member of Delrio's gang. Barba argues the People did not prove this foundational fact with competent evidence, and in so arguing, he assails the notion his presence during the shooting was somehow indicative of his membership in 18th Street. But both Vi and Wainwright testified participation in a gang-related offense is indicative of a person's gang membership. As they explained, gang members must be able to trust their companions when they commit a crime, so they would not be inclined to bring along someone who was not in their gang. This wasn't improper "gang profile" evidence, as Barba maintains; rather it was precisely the sort of testimony that has been allowed in gang cases to help the jury understand the culture and inner workings of criminal street gangs. (*People v. Manriquez* (1999) 72 Cal.App.4th 1486, 1492.) So, the fact Barba helped Delrio, a hardcore gang member, carry out a gang-related offense was indicative of Barba's gang status. (*Ibid.*)

Barba's involvement in the shooting wasn't the only factor bearing on this issue. Barba and Delrio were also good friends, and, in fact, when the police looked in Barba's cell phone following his arrest, they noticed Delrio was listed in the directory by

his gang moniker, "Toker." In addition, the police found CD's with gang writing on them in Barba's car after the shooting. Considering all of the evidence presented on the issue, the jury could reasonably find Barba was a member of the 18th Street gang. And, based on Vi's testimony that gang members usually know when another member of their gang is armed, the jury could also reasonably infer Barba knew Delrio had a gun. Therefore, we reject Barba's challenge to the sufficiency of the evidence to support his conviction for attempted murder.

III

Barba also challenges the constitutionality and applicability of the natural and probable consequences doctrine. The challenge fails.

The trial court instructed the jury Barba was liable for attempted murder if he committed the crime of disturbing the peace, and attempted murder was a natural and probable consequence of that crime. (CALCRIM No. 403.) The court defined disturbing the peace to include the acts of challenging someone to fight and using offensive words that are inherently likely to provoke an immediate reaction. (CALCRIM Nos. 2688, 2690.) Based on these instructions, the prosecutor argued Barba was guilty of attempted murder because he aided Delrio in disturbing the peace, i.e., hitting up Hernandez and cursing his gang, and attempted murder was a natural and probable consequence of that offense under the circumstances that obtained here.

Because the jury was not required to find Barba possessed the intent to kill in order to convict him of attempted murder under the probable consequences doctrine, Barba contends the doctrine created an irrebuttable presumption of malice and violated his right to due process and a fair trial. That is not the case. "'A defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him

for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 254, quoting *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Therefore, the jury was not required to find Barba shared Delrio's intent to kill in order to find him guilty of attempted murder under the natural and probable consequences doctrine.

Nevertheless, Barba argues that, from a factual standpoint, attempted murder was not a natural and probable consequence of anything appellants did to Hernandez before the shooting. In so arguing, Barba would have us believe that he and Delrio simply wanted to ask for directions when they first approached Hernandez and that they did not do anything to threaten or provoke him.

But in determining whether a particular crime is a natural and probable consequence of a target offense, we must view the evidence in the light most favorable to the judgment below. (*People v. Jones, supra,* 51 Cal.3d at p. 314; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1594.) Viewing the record from this perspective, there is ample evidence from which the jury could find attempted murder was a natural and probable consequence of appellants' actions in disturbing the peace. In pulling up behind Hernandez in their car, appellants gained a position of advantage from which they could initiate the confrontation. And from there, Delrio quickly went on the offensive by asking Hernandez where he was from. In gang parlance, this is known as a "hit up." It was, as the gang experts explained, a provocative act in and of itself because it required Hernandez to announce his gang affiliation in the presence of potential rivals. But that wasn't all. After Hernandez said he was in BFTH, Delrio replied, "fuck The Boys" and "fuck your neighborhood." Given BFTH's history as a criminal street gang, BFTH's ongoing rivalry with appellants' gang, violence and gunfire were almost sure to follow this reply. (See *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 [recognizing that

"when rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire."].) All told, the circumstances were clearly such that a reasonable person in Barba's position would have known attempted murder was a natural and probable consequence of the initial confrontation. This was sufficient evidence to support his conviction for attempted murder under the natural and probable consequences doctrine.

IV

Barba asserts the trial court violated his right to due process, his right to present evidence and his right to a fair trial by refusing to instruct on the lesser related offenses of assault with a deadly weapon, assault, negligent shooting and accessory after the fact. However, the law is clear that a defendant does not have a constitutional right to instructions on lesser related, as opposed to lesser included, offenses. (*Hopkins v. Reeves* (1998) 524 U.S. 88; *People v. Rundle* (2008) 43 Cal.4th 76, 146-148; *People v. Birks* (1998) 19 Cal.4th 108, 136; *People v. Valentine* (2006) 143 Cal.App.4th 1383, 1388.) Therefore, we have no basis for disturbing the trial court's ruling on this issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V

Barba's final claim is that the prosecutor misstated the evidence in closing argument when talking about the gunshot residue evidence. Although Barba waived this claim by failing to object to the prosecutor's argument (*People v. Green* (1980) 27 Cal.3d 1, 29), we will consider it nonetheless because he contends his trial attorney was ineffective for failing to preserve the issue for appeal. (*People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 [addressing issue that was waived by appellant's failure to object "to forestall a petition for writ of habeas corpus based on a claim of ineffectual counsel"].)

In discussing the gunshot residue found on Barba, the prosecutor told the jury, "[Y]ou heard testimony that 90 percent of it disappears in the first hour. So it's not

a tool that we see very often, because when folks are fleeing or we don't catch them for a couple days, you don't get any of this kind of evidence.

"But the fact that there's gunshot residue on Mr. Barba's left hand is really important here. It is not on his right hand where he could say 'oh, I just touched the seat, because the gun was over there on the seat. It got on my hand.' It's on his left hand. And he's the driver. It's right over there near the door.

"I submit to you not only did he know about this gun, but he handled this gun at some point afterwards. That isn't critical to your findings?

"But it's very – you heard from [forensic specialist Steve] Gulizian it's quite rare that gunshot residue is found on people. Therefore, I think it's quite powerful evidence, because it goes to show contact somehow with these elements that . . . are spewing out. So I think that is critical here. Because he's basically saying he knew nothing about the gun, but oops, sorry. Got some residue from it right on my own hands."

As Barba rightly notes, Gulizian testified that while 90 percent of gunshot residue dissipates within the first hour after a shooting, it is "not unusual" to find gunshot residue on samples collected from subjects and objects at the scene of a shooting. So, in describing such findings as "rare," the prosecutor did overstate the evidence. Barba also takes issue with the prosecutor's description of the gunshot residue evidence as "powerful" and "critical." However, "[a] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on . . . its quality[.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 945-946, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Therefore, while the prosecutor may have overplayed the gunshot residue evidence by describing it as powerful and critical, these characterizations did not amount to misconduct.

Moreover, we are convinced Barba was not materially prejudiced by anything the prosecutor said in closing argument. The prosecutor's main point was that

the gunshot residue on Barba proved he handled the gun *after the shooting*, but even if that were true, it would not have had much of a bearing on the case because Barba's defense was that he didn't know about the gun *before the shooting*. Simply put, it is not reasonably probable Barba would have obtained a more favorable result absent the challenged remarks. Therefore, they are not cause for a reversal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

VI

We now turn to Delrio's arguments.[2] He contends the court prejudicially erred in allowing Hernandez and Vi to testify about certain events that transpired between 18th Street and BFTH before this case arose. Although some of this evidence should have been excluded, we do not believe its admission was materially prejudicial to appellants' case.

During direct examination, the prosecutor asked Hernandez if he was aware of an incident in which a BFTH member named Casper was shot. When Hernandez answered, "They told me about it," the defense objected on hearsay grounds, but the court overruled the objection. Hernandez went on to testify that he knew Casper had been shot in the stomach and lived. He also testified that he had heard within his gang that the shooting was carried out by members of 18th Street.

Delrio argues this testimony should have been excluded as inadmissible hearsay because it was based on what Hernandez heard from other people. In response, the Attorney General contends that since Hernandez was a long-time member of BFTH, he was an expert on the gang and thus entitled to rely on hearsay in testifying about the gang's affairs. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) However, the court did not designate Hernandez as an "expert" witness in the usual sense of the word. Rather, it simply determined he had sufficient experience within BFTH to testify about his *own*

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2 Barba joins Delrio's arguments to the extent they apply to him.

experiences within the gang. And since he lacked personal knowledge of the Casper incident, the court should not have been permitted him to testify about it based on information he received from other, unnamed sources.

That said, it is clear the admission of Hernandez's testimony about the Casper shooting was harmless error because it did not implicate appellants in the shooting. It did implicate their gang, but there was a wealth of other evidence showing that 18th Street and BFTH were at war with each other at the time the present case arose. In fact, Hernandez testified there were about a dozen shooting incidents between the two gangs in the months leading up to this case. Therefore, it is not reasonably probable appellants would have obtained a more favorable result had Hernandez's testimony about the Casper shooting been excluded. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

Unlike Hernandez, Vi was qualified in the conventional sense as an expert on gangs. So, he was authorized to rely on hearsay in forming his opinions about the case. (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) And that he did. In explaining the basis for his opinion Barba was a member of 18th Street, Vi said he relied on information he received from Hernandez about an altercation that had occurred between 18th Street and BFTH. Vi said Hernandez had told him the altercation took place in a park about two weeks before the present case arose, and during the incident, two people were seen in a gray Mustang convertible. In conjunction with this testimony, and again during its final instructions, the court admonished the jurors they could only consider this testimony for the limited purpose of evaluating Vi's opinions, and they could not consider it for its substantive truth.

Delrio dismisses these admonitions as ineffective and contends the trial court should have excluded Vi's testimony altogether. However, gang experts may generally rely on information from gang members in forming their opinions about a case. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 618-620; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966.) Although "'the trial court may exclude from the expert's

testimony 'any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value'" (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172), this is an area of the law where "'much must be left to the trial court's discretion.'" (*Ibid*.) Indeed, "'[b]ecause an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment.' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 410.)

Delrio contends Vi's testimony about the altercation in the park was unduly prejudicial because the jury would have linked it to Hernandez's testimony about the Casper shooting. Particularly, he fears that, taking Vi's and Hernandez's testimony together, the jury would have been able to figure out the Casper shooting and the park altercation were one in the same.[3] However, Vi did not say that the altercation involved a shooting or even that it involved Casper; and Hernandez did not say who specifically was involved in the Casper shooting. Given that BFTH and 18th Street had been involved in a great many fights and shootings before the instant case arose, it is unlikely the jury would have assumed the altercation in the park was the same incident in which Casper was shot. Considering as well that Vi's testimony about the altercation did not reference any specific acts of violence or personally implicate appellants in any wrongdoing, we do not believe it was unduly prejudicial. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 511 [trial court did not abuse its discretion in allowing gang expert to rely on hearsay as basis of his opinions where the hearsay "did not directly name or implicate defendant in any other criminal activity"]; compare *People v. Coleman* (1985) 38 Cal.3d 69, 93 [hearsay evidence which formed basis of expert's opinion was unduly prejudicial where it directly implicated the defendant as making personal threats against the victim].)

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[3] This became clear when the parties were discussing the issue outside the presence of the jury.

Delrio also attacks the reliability of Vi's testimony about the park altercation. He correctly notes the testimony rested on two layers of hearsay, in that Vi learned of the altercation from Hernandez, and Hernandez learned of it from Casper. However, Hernandez testified at trial and was thus subject to full cross-examination. And Casper was personally wounded in the park altercation, so he had a pretty good incentive to remember who was there. Therefore, even though Vi did not personally investigate the altercation and independently corroborate the information Hernandez gave him, the information was sufficiently reliable for Vi to use it as a basis for his opinions in the case.

And that's the only purpose for which the jury was allowed to consider this information. In fact, the court twice admonished the jurors they could only consider Vi's testimony about the park altercation for the limited purpose of evaluating his opinions and could not consider it for its substantive truth. We presume the jury followed this admonishment (*People v. Yeoman* (2003) 31 Cal.4th 93, 139) and that it cleansed Vi's testimony of any possible prejudice. (*People v. Carpenter, supra,* 15 Cal.4th at p. 410; *People v. Valdez, supra*, 58 Cal.App.4th at p. 511.) Considering the nature and basis of Vi's testimony about the park altercation, as well as the limited purpose for which the testimony was admitted, the trial court did not abuse its discretion in allowing the testimony into evidence.

VII

Delrio also contends the court erred in denying his request for a mistrial. The request was made in response to Vi's answer to a question on cross-examination about whether he knew Casper was a felon. Vi said, "I don't know if he's a felon, but I know he got shot by 18th Street two weeks before this shooting." Delrio argues the answer warranted a mistrial because it suggested appellants were the ones who shot Casper. We don't see how.

In order to justify a mistrial based on a witness' volunteered statement, the statement must be incurably prejudicial. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) Whether the statement rises to this level is "'a speculative matter, and the trial court is vested with considerable discretion'" in ruling on the issue. (*People v. Williams* (1997) 16 Cal.4th 153, 211, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.) As a general rule, "'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." [Citation.]'" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.)

This is not such an exceptional case. In denying appellants' request for a mistrial, the trial court found an absence of bad faith by the prosecution. It also pointed out that "the jury [] heard a truck load of evidence about the shootings going back and forth between 18th Street and [BFTH]." And as far as Vi's response was concerned, the court commented it was "very bland" in terms of providing any details about the Casper shooting. In addition, the court struck Vi's statement from the record and ordered the jury to disregard it. Under these circumstances, it would be presumptuous to believe the jury used the statement to pin the Casper shooting on appellants. All things considered, the trial court did not abuse its discretion in denying appellants' motion for a mistrial.

VIII

Lastly, Delrio maintains the trial court's instructions on reasonable doubt violated his due process rights because they did not mirror the definition of reasonable doubt that is set forth in the Penal Code. We disagree.

Penal Code section 1096 states reasonable doubt "'is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they

cannot say they feel an abiding conviction of the truth of the charge.'"

CALCRIM No. 220, which was given in this case, does not explain reasonable doubt in these exact terms. Rather, it tells jurors that proof beyond a reasonable doubt is "proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial."

Delrio argues CALCRIM No. 220 fails to convey the subjective element required for proof beyond a reasonable doubt. Noting the instruction omits Penal Code section 1096's reference to the jurors' *feelings* about the evidence, he submits CALCRIM No. 220 effectively directs jurors to employ an objective standard of reasonable doubt when it should be telling them that they cannot vote to convict the defendant unless they personally, subjectively and conscientiously believe he is guilty.

Delrio's argument is eloquently crafted and presented, but it fails to persuade. Although there are some minor differences between Penal Code section 1096 and CALCRIM No. 220, the fact remains CALCRIM No. 220 is couched in subjective terms. It states, "Proof beyond a reasonable doubt is proof that leaves *you* with an *abiding conviction* that the charge is true." (CALCRIM No. 220, italics added.) In using the word "you" and requiring jurors to have an "abiding conviction" in their verdict, CALCRIM No. 220 conveys the sense of subjective certainty necessary to satisfy due process. (*Victor v. Nebraska* (1994) 511 U.S. 1, 14-15 ["An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof"]; *People v. Light* (1996) 44 Cal.App.4th 879, 885 [the term abiding conviction "convey[s] the requirement that the jurors' belief in the truth of the charge must be both long lasting and deeply felt."].)

The court also gave CALCRIM No. 3550, which told the jurors they "'must decide the case for yourself' and that they should not change their minds 'just because other jurors' disagree with them. There is little likelihood the jury misunderstood these instructions to mean something other than the type of personal conviction [appellant] seeks to ensure." (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 31.) Looking at everything the jurors were told, it is not reasonably likely they used an objective standard of reasonable doubt in assessing Delrio's guilt. Therefore, we find no violation of his due process rights.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.